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RECEIVABLES FINANCING

Group of experts report prepared by the Permanent Bureau of the Hague Conference on Private International Law

Note by the Secretariat

1. At its twenty-fifth session, it was noted that the difficulty of addressing private international law aspects of assignment should not result in their exclusion from the future work of UNCITRAL but should rather lead to closer cooperation with the Hague Conference on Private International Law, for example, through the holding of joint meetings of experts on questions of common interest related to assignment of receivables (A/50/17, para. 380).

2. Accordingly, the Permanent Bureau of the Hague Conference on Private International Law organized in cooperation with the Secretariat a meeting of experts (The Hague, 18-20 May 1998) to discuss the private international law aspects of assignment in the draft Convention on Assignment in Receivables Financing.

3. Following the meeting of this group of experts, the Secretariat received from the Permanent Bureau of the Hague Conference on Private International Law the report of the meeting drafted in French. The document in question is attached to the present note in the form in which it was received by the Secretariat.

ANNEX

Working group organized by the Hague Conference on Private International Law in cooperation with the UNCITRAL Secretariat

Assignment of receivables

Report
prepared by Catherine Kessedjian,
Assistant Secretary-General of the
Hague Conference on Private International Law,
with the assistance of trainee Patrick Wautelet

At the invitation of the Hague Conference on Private International Law, in cooperation with UNCITRA a working meeting was held in The Hague in the offices of the Permanent Bureau of the Conference from to 20 May 1998.

The meeting was attended by experts from 16 States.

The purpose of the discussion was to weigh the advantages and disadvantages of the provisional choi made by the UNCITRAL Working Group assigned the tasks of preparing a draft Convention on Assignm in Receivables Financing, ascertaining any difficulties posed by these choices and, if possible, validating th or proposing other options. Where the provisions proposed in the draft Convention were considered liabl give rise to too many problems but no alternative could be proposed, the experts recommended that the m points of the discussion be outlined in the present report without any specific proposal being put forward.

The discussion was organized around the following five main topics, which now serve as a framework this report: (1) the role of conflict-of-laws rules in delimiting the geographical scope of application of Convention; (2) the concept of internationality and its different applications in the draft Convention; (3) definition of the concept of "location"; (4) conflict-of-laws rules designed to compensate for the absence substantive solution; and (5) general conflict-of-laws rules designed to be applicable even when the Convent is not applicable.

By way of introduction, mention should be made of certain general principles underlying the work UNCITRAL, as recalled by a number of experts: (1) the proposed rules must reflect the needs of mod financial practice; and (2) the rules must serve to increase the certainty and predictability of the solutions; t must permit the bulk assignment of present and future receivables. These principles provided the backgro to the working group's discussions.

(1) The role of conflict-of-laws rules in delimiting the geographical scope of application of the Convent

The first article of the draft Convention[1] provides as follows:

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[1] The reference text is document A/CN.9/WG.II/WP.96.

(1) This Convention applies to assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the assignment, the assignor is located[2] in a Contracting State.

(2) [The provisions of articles [...] do not apply] [This Convention does not affect the rights and obligations of the debtor] unless the debtor is located in a Contracting State [or the rules of private international law lead to the application of the law of a Contracting State to the relationship between the assignor and the debtor].

...

It may be noted that different methods have been chosen in the two paragraphs of the first article cited above: the first paragraph merely states a precise geographical criterion without referring to the rules of private international law, while the second paragraph (intended as a partial exception to the first paragraph) proposes possibly enlarging the scope of application of the Convention vis-à-vis the debtor when the law applicable to his relationship with the assignor (the law governing the assigned receivable) is that of a Contracting State.[3] The experts therefore looked at the possibility of harmonizing the two provisions with the aim of incorporating in paragraph 1 an enlargement of the scope of application through the rules of private international law.

1.1 The experts first of all discussed the very principle of employing private international law rules in order to increase the number of cases in which the Convention might be applicable. Such a method has already been used by UNCITRAL in the Vienna Convention on Contracts for the International Sale of Goods of 11 April 1980, which, in its article 1, paragraph (1)(b) provides that the Convention is applicable "when the rules of private international law lead to the application of the law of a Contracting State". One of the chief advantages of such a provision, as we know, is to permit application of the Convention in cases where, in its absence, a State would be able to apply the domestic law of the State designated by the conflict-of-laws rule, even if that State has ratified the Convention.

It was recalled that this provision, which was inserted at a late stage in the Vienna Convention negotiations, proved so controversial that a reservation option was attached to it. The provision itself raised practical problems of application, commercial operators being for the most part unaware of the particular procedures employed in private international law, procedures which are, moreover, further complicated by the possibility open to each State of issuing a reservation.

Quite apart from this practical difficulty, however, a fundamental problem is posed by the task of determining what are the rules of private international law that have to be applied. One of the experts suggested that these rules could be drawn from the Convention itself, provided that it contain general rules going beyond the application of the substantive rules of the Convention.[4] In actual practice, in the context of the Vienna Convention, it is the private international law rules of the jurisdiction competent to deal with a dispute that have

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[2]Regarding the definition of this term, see section 3 below.

[3]Note that the difference in method is due to the fact that the second paragraph was not the subject of discussion by the UNCITRAL Working Group since it was introduced recently in the draft text.

[4]Regarding this question, see section 5 below.

to be applied.[5] If this solution were to be adopted in connection with the draft Convention on Assignment in Receivables Financing, it could jeopardize the achievement of the two fundamental objectives of the Convention, namely certainty and predictability.[6] At the time that assignor and assignee negotiate the assignment, the location of the jurisdiction competent to deal with any disputes arising may be difficult to determine, especially if the parties have not agreed on a jurisdiction clause.

This difficulty is minimized, however, if the parties have made a choice of law. In this case, though, the basic argument adduced against the use of private international law rules is that the Convention contains rules on priority and, more generally, on the rights of third parties. These provisions are said to be among the main achievements of the Convention. But the rights of third parties cannot be made to depend on the choice of a law or jurisdiction by the parties to the assignment. Consequently, it was recommended that paragraph 1 of the first article should not be amended.

1.2 The second paragraph of the draft Convention already contains a clause extending the Convention to the debtor if the law applicable to the relationship between assignor and debtor is that of a Contracting State, even if the debtor is not located in the territory of a Contracting State. The justification for this proposition is the idea that the Convention contains substantive provisions to protect the debtor which are supposed to be known to the latter in the two cases covered by this text. Such a provision, however, would make it extremely difficult to effect bulk assignments because, in order to assess the risks involved, the assignee would have to determine the law applicable to each individual receivable assigned. Granted, the same difficulty is raised by the requirement that the debtor be located in a Contracting State, in which circumstances the assignment could include receivables due from debtors located in Contracting and non-Contracting States. However, in this case, if the assignee wishes to distinguish between these receivables in order to evaluate the risks involved, the strict geographical criterion provides a means of doing so without any great difficulty, which would not be so if it were necessary to proceed by means of conflict-of-laws rules.

Accordingly, the experts recommend deleting the reference to private international law in the second paragraph of the first article.[7]

(2) Internationality

Having decided to maintain article 1.1 in its present wording, the Working Group went on to discuss the necessity of defining the concept of internationality in the two cases covered by this article, namely assignment of international receivables and international assignment of receivables.

It was recalled that there was a well established tradition at the Hague Conference on Private International Law of not defining internationality. Comparative studies show that at least two concepts of internationality

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[5]Some consider this statement to be too general. If the competent jurisdiction is not a Contracting State of the Convention, it is not bound by article 1(1)(b) and is not required, under public international law, to apply the Convention even if its private international law designates the law of a Contracting State. This same difficulty arises in a general manner if the dispute is brought before an arbitral tribunal which, say, does not constitute a jurisdiction and is not bound, *a priori*, by the international conventions. However, it could be asserted that, on the contrary, the arbitral tribunals must take account of all the international conventions in force. Many arbitral tribunals proceed according to this principle. These two points of contention might be sufficient in themselves to discourage the drafters from adopting this approach.

[6]The experts made constant reference to these two objectives in the course of the discussion, thus demonstrating that each rule proposed (substantive rule or conflict-of-laws rule) must fulfil these requirements.

[7]If the UNCITRAL Working Group nevertheless decides to retain this reference, it will be necessary to ensure that the reference to the law of a Contracting State specifies the provisions of the Convention and not its domestic law.

coexist in most countries: a legal concept and an economic concept. The legal concept consists in taking account of either the nationality or the geographical location of the parties concerned. The economic concept relates to the flow of goods, persons, financiers and so forth across borders. According to the latter sense of the term, a relationship qualifies as "international" if it was entered into by partners located in the same territory but with one of the elements of the relationship to be performed in a different State.

The advantage of the legal concept lies essentially in its simplicity[8] and the consequent enhancement of the certainty and predictability of solutions. The economic concept, on the other hand, makes it possible to increase the number of operations to which the international rules will be applicable. These international rules are often unified and more flexible, which is why many firms prefer to qualify their relationships as international.

In the context of the Hague Conventions, the drafters have always avoided reducing the concept to one or other of the two alternatives. The coexistence of the two criteria and possibly others has not been deemed prejudicial to the proper operation of conventions in the sphere of private international law.

However, in the context of the Convention under discussion, it was explained that firms have to be able to determine with certainty and in advance the cases where the Convention is applicable. To that end, it was felt necessary to formulate a definition, for which only precise, objective and straightforward criteria were considered to be sufficient.

It was apparent from the discussion of suitable criteria for adoption that various practical problems might arise from the definition of internationality in connection with bulk assignments. The way it is worded in the draft, article 3 allows the assignment of both international and domestic receivables through one and the same operation. The group felt that the solution to this problem did not lie in modifying the internationality criteria but in possibly adding a provision specifying that the rights and obligations of the debtor with respect to an assigned domestic receivable would not be affected by the Convention.

Consequently, the group decided to recommend that article 3 of the draft be retained in its current wording.

(3) The definition of the concept of location

Several provisions in the draft Convention contain a reference to the location of one of the parties to the assignment of a receivable.

Article 5(j) proposes that this concept be defined as follows:

> *A person is located in the State in which it has its registered office, or, if it has no registered office or in the case of an individual, its habitual residence.*

It was recalled that, traditionally, a distinction needed to be drawn between rules applicable to individuals and rules applicable to corporations or other group entities.

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[8]This simplicity may be in appearance only since the determination of nationality (specifically, that of a corporate body as distinct from an individual) or of habitual residence or other form of location may prove to be a highly complex matter in practice. Regarding the concept of "location" within the meaning of the draft Convention under discussion, cf. section 3 below.

As regards individuals, modern private international law favours relating location to habitual residence rather than domicile. The notion of habitual residence is more flexible and more factual, while also reflecting the reality of the individual's place in a given legal, economic and social system.[9]

With regard to corporations, comparative law shows that the countries continue to be divided into those that take as their criterion the registered office (place of registration)[10] and those that prefer the actual head office. We might mention here that a variety of terms are used to denote the actual head office, including central administration, principal place of business and centre of main interests.

For proponents of the "head office" alternative, this term affords the advantage of locating the corporation at the centre of its business interests and corresponds in functional terms to the concept of habitual residence for individuals. "Registered office", however, denotes a deliberate choice on the part of the corporation, which may be dictated by concerns that are totally divorced from the nature of its activity but relate rather to the internal organization of the corporation[11] or to tax-related decisions.

It has to be noted that private international law has not achieved any major successes in harmonizing the definition of the seat of corporations, each country remaining loyal to its traditions. By way of illustration, we cite article 58 (first paragraph) of the Treaty of Rome constituting the European Community, unmodified by subsequent Treaties, which provides as follows:

> *Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.*

Article 3 of the European Union Convention on Insolvency Proceedings, signed in Brussels on 23 November 1995, provides as follows in article 3, paragraph 1:

> *... In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.*

Likewise, the UNCITRAL Model Law on Cross-Border Insolvency refrains from making a choice, since its article 16, paragraph 3, provides:

> *In the absence of proof to the contrary, the debtor's registered office, ... is presumed to be the centre of [its] main interests.*

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[9]From the point of view of attempting to systematize the criteria to be taken into consideration in determining the habitual residence of an individual, valuable insights are provided by the article by Dr. E. M. Clive, "The Concept of Habitual Residence", *The Juridical Review*, 1997, pp. 137-147.

[10]The question was raised as to whether the concept of "*siège statutaire*" corresponded precisely to the notion of "registered office" employed in the English version of the draft Convention. The point was not explored in any great detail.

[11]It is worth mentioning, for instance, that Delaware, in the United States, has evolved a highly sophisticated corpus of legislative and doctrinal rules enabling companies to administer their internal organization to best effect, which accounts for the decision of many enterprises to locate their registered office in that state despite not having any business activity there.

In contrast to this majority trend that thus seems to be emerging in the direction of not making a choice between the two alternatives in order to keep closer to the actual economic situation of the corporation concerned,[12] the draft Convention on Assignment in Receivables Financing makes a choice by opting for the registered office, as indicated above.

One argument adduced in favour of this choice relates to the necessity of being able to identify the location of the assignor with certainty.[13] In this respect, it is the view of some experts that the registered office is the only satisfactory option.

However, it is recalled that in the vast majority of cases, the registered office and the actual head office are the same. In cases where the company has opted for a dichotomy,[14] the applicability of the Convention, which is essentially focused on the location of the assignor, will all but entirely preclude applicability of this text because the countries in which, traditionally, companies locate their registered office remain outside efforts to harmonize the law, hardly ratifying any of the available conventions.[15]

If one looks at the matter from the point of view of the assignee, for which the applicability of the Convention is very important and whose rights and obligations depend for the most part, given the silence of the Convention's substantive rules, on the law governing the assignor, the short-term certainty represented by the registered office of the assignor may prove counter-productive in the cases of dichotomy referred to in the previous paragraph

The group dwelt at length on the subject of the mobility conflict. The group was divided as to whether it was easier to change a registered office or an actual head office. Short of coming down in favour of one or the other, this point was not felt to be likely to have any influence over the choice between the two alternatives. That said, the experts were unanimous in the view that a provision ought to make it possible to settle the mobility conflict in the context of conflict-of-laws rules.

In conclusion, the group considers that the definition relating to individuals should be separated from that adopted for corporations and other group entities.

As regards individuals, the group decided in favour of the criterion of habitual residence.

In the case of corporations, no final conclusion emerged.

Nonetheless, it was proposed to take as a basis the definition given in article 4, paragraph 2, of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, which provides as follows:

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[12]In this regard, it should be pointed out that the 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit provides in article 22 that the applicable law is that of the State in which the guarantor or the issuer has the place of business at which the undertaking was issued.

[13]The draft Convention employs the concept of "location" with reference to both the debtor (articles 1(2) and (3) and the assignee (article 3), but it is true that most of the rules are centred on the location of the assignor.

[14]We refer here to an international dichotomy rather than a dichotomy within a federal State since, in the latter case, the Convention normally applies to the whole of the federal territory.

[15]One reply made to this is that the enterprises that have made this choice and would consequently be denied access to financing by assignment of receivables by virtue of the non-applicability of the Convention would be prompted to change their registered office.

Subject to the provisions of paragraph (5) of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

or, if not, to take as a basis the European Union Convention on Insolvency Proceedings mentioned above.

At all events, the experts came to the conclusion that, whatever the final choice made as to registered office or actual head office, it was probably necessary to envisage a separate rule for cases where the assignor acted through an autonomous establishment, branch office or other entity without distinct legal personality.

(4) Conflict-of-laws rules designed to compensate for the absence of a substantive solution

The group of experts was in agreement as to the valuable role that the conflict-of-laws rules could play in connection with the draft Convention by completing the process of harmonizing the law in the field of assignment of receivables with respect to those issues for which the negotiators had not succeeded in identifying substantive rules. This applies to questions of form, assignability, the right to the proceeds of receivables, the law of priority and competing rights in the event of insolvency of the assignor. Each of these points will be tackled individually.

4.1 Form

The current wording of article 9 of the draft Convention offers several variants. Variant A envisages a substantive rule requiring assignment in written form. Some experts, however, have indicated that this substantive rule is unacceptable for a small number of countries whose tradition would thus be upset by the Convention. It is therefore highly likely that the draft Convention will not be able to contain a provision worded as in variant A.[16]

The question then arose as to the law applicable to form in the absence of any substantive rule. What variants B and C of the same article propose, albeit with some fairly substantial differences between them, are in fact two conflict-of-laws rules. These rules do not, however, correspond to the present trend in private international law towards favouring an alternative conflict rule designed to validate the contract or legal transaction. It was shown, moreover, by several experts that there is little chance of a conflict-of-laws rule achieving the objective sought by a provision on form.

On mature consideration, it is felt that the aim pursued by form in the context of the draft Convention is not so much a question of validity as identification of the content of the assignment or, in other words, proof of that content. The experts were in agreement, therefore, that a substantive rule was preferable to a conflict rule. This rule could be reformulated in relation to the current variants proposed in the Convention and could be reworded as follows:

"A receivable is deemed to have been assigned if its assignment is proven by any means ..."

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[16]Nonetheless, it was suggested that variant A be maintained and that States be allowed to issue a reservation if they so wish.

A further possibility would be to combine variants B and C, but the group of experts did not have time to look more closely into the possible drafting of such a combined text.

4.2 Assignability

The question of assignability consists of two separate and distinct problems: contractual assignability and statutory assignability.

4.2.1 The experts considered the question of whether it was reasonable for the Convention to stipulate a rule such as that contained in article 12 of the draft, whereby a receivable is assignable even if it has been the subject of an anti-assignment agreement between the assignor and the debtor. In this regard, the experts discussed whether article 12 could be modified by article 30, which establishes a conflict-of-laws rule to settle questions relating to the assignability of a receivable without specifying whether such a conflict rule applies to both statutory and contractual assignability. This point will need to be clarified in order to delimit the application of articles 12 and 30 respectively.

In view of the impossibility of ascertaining whether or not national provisions on contractual assignability are mandatory, it was suggested that a comparative law study might be undertaken before finally confirming this provision of the draft, which would appear to seriously threaten autonomy of will and contractual predictability from the point of view of the debtor. The experts did not, however, make any recommendations in this respect.

4.2.2 As regards statutory assignability which is not governed by article 12 but by article 30 (conflict rule), the discussion focused on the sufficiency or otherwise of the public policy exception or that concerning the mandatory rules. The group of experts concluded that, on balance, they were not sufficient. A conflict-of-laws rule was therefore deemed necessary. It might designate the law governing the assigned receivable. Such a law did not, however, seem to be satisfactory in the case of bulk assignments.

4.3 The right of the assignee to the proceeds of receivables

This right was governed by an article 17, for which new wording should be proposed by the UNCITRAL Secretariat. The concept of "right to the proceeds" seems to be unknown in the civil-law systems, although it may be akin, without being identical, to a right to follow property.

All the conflict-of-laws rules examined in the course of the discussion were shown to have their limitations. To be absolutely sure of success, it would be necessary to apply two conflict rules cumulatively: the law of assignment and the law applicable to the proceeds into which the receivable has been transformed. In the face of the complexity of such a solution, the experts take the view that it would be better not to seek a solution in a conflict-of-laws rule.

4.4 Priority rights

Article 23 of the draft Convention proposes that priority among several assignees for the same receivables from the same assignor be made subject to the law governing the assignor.[17]

This provision was considered to be a good rule by the experts (or, at any rate, the least bad possible), given that:

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[17]The question of the mobility conflict was raised again with reference to this text. It has already been mentioned in section 3 above. It will have to be dealt with in language to be added, as indicated earlier.

(a) The law governing the assigned receivable is impossible to apply in the case of bulk assignments, which is essentially where the question of priority arises because it comes into play if the assignor has assigned to several assignees a comprehensive set of receivables, an increasingly common procedure in financial management;

(b) The debtor is protected by substantive provisions of the Convention and the conflict-of-laws rule thus proposed will not apply unless the Convention itself is declared applicable in its entirety.

4.5 Competing rights in the event of insolvency of the assignor

Article 24 of the draft Convention provides that the issue of the competing rights of an assignee and the insolvency administrator or the assignor's creditors is subject to the law governing the assignor.

The justification given for this choice is that if an insolvency proceeding is opened, it will be so in the place where the assignor is located. This justification, however, argues in favour of a different definition of the concept of the location of the assignor with respect to article 24 if the definition of this concept is maintained in the form currently appearing in article 5(j), i.e. registered office. Both the European Union Convention and the UNCITRAL Model Law on Cross-Border Insolvency allow the presumption to be reversed in favour of the actual head office in the event of a dichotomy with the registered office.

The provisions of article 24, paragraphs 3 and 4, were designed to compensate for this deficiency. It has to be said that these provisions are rather complex. The wording of paragraph 3 is somewhat unusual. It reverses the operation of the public policy exception, the aim of which is normally to prevent the application of a foreign measure, law or decision. A new formulation, which reflects practice in the field more closely, might be proposed as follows:

"The application of the provisions of the present article may be refused if they are manifestly contrary to the public policy of the forum State."

With regard to paragraph 4, the cases covered might not encompass all the specific cases that might arise in practice.[18]

(5) General conflict-of-laws rules intended to be applicable even when the Convention is inapplicable

The process proposed is to combine chapter VI of the draft Convention, comprising articles 29 to 33, with article 1, paragraph 3.[19]

This process is not unprecedented in UNCITRAL; it was used in the 1995 Convention on Independent Guarantees and Stand-by Letters of Credit. But this Convention contains only two private international law provisions, which are limited in their scope of application and are, moreover, far from controversial and hence unlikely *a priori* to cause any great upheavals in the law of the Contracting States.

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[18]The group of experts did not discuss article 24, paragraph 5. However, on re-reading a doubt arose as to the precise scope of this provision.

[19]This text reads as follows: "[The provisions of articles 29 to 33 apply [to assignments of international receivables and to international assignments of receivables as defined in this chapter] independently of paragraphs (1) and (2) of this article.]"

Chapter VI of the current draft of the Convention, however, is a different matter altogether. In the first place, some experts commented that States not parties to the 1980 Rome Convention on the Law Applicable to Contractual Obligations[20] or to a different convention[21] feel a need to harmonize their conflict-of-laws rules in the field of assignment of receivables. These experts regard the negotiation of the UNCITRAL Convention as a good opportunity to attempt to achieve this.

This is the reason why chapter VI of the draft has been inserted and why it seeks to regulate not only the assignment contract but also its effects on third parties and its effects on the property transfer of the receivables in question.[22]

The primary purpose of chapter VI is to establish conflict-of-laws rules for the assignment contract. However, this contract does not bear any special features in terms of the relationship between assignor and assignee such as to warrant the presence of a conflict-of-laws rule in a special convention. Quite possibly a need is now being perceived worldwide to harmonize the conflict-of-laws rules in contractual matters, but a special convention does not provide the right context for such an endeavour.

The same goes for the conflict-of-laws rule applicable to the assigned receivable. In the first place, in the actual context of what is envisaged for the Convention, the assigned receivable may take widely differing forms (namely, contractual or tort-based). However, article 30, which again seeks to provide a general rule applicable to contractual receivables, says nothing specific about other types of receivable, except for a rather cryptic reference to a "decision or other act". At all events, questions of the law applicable to the assigned receivable are not specific to assignments of receivables.

In view of the foregoing, some experts ventured to suggest that chapter VI should be deleted in its entirety from the draft Convention.

If need be, one might envisage retaining a text inspired by article 30, paragraph 1, but only provided that it is redrafted by removing the references to mechanisms specific to the substantive provisions of the Convention, which in the case, say, of the general conflict-of-laws rules would not be applicable. It was therefore proposed that this provision be calqued on article 12, paragraph 2, of the Rome Convention on the Law Applicable to Contractual Obligations, which provides as follows:

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[20]This is a Convention open to member States of the European Union only. It contains an article 12 specifically devoted to the assignment of rights and an article 13 setting forth a provision on subrogation.

[21]Reference may be made here to the Inter-American Convention on the Law Applicable to International Contracts, signed in Mexico on 17 March 1994. This Convention has not yet entered into force.

[22]One of the questions raised is whether this chapter has to be limited to assignments of receivables not covered by the substantive rules of the Convention or whether they should be of general application, covering assignments of receivables falling outside the scope of application of the Convention. Some experts expressed a clear preference for this second alternative, which is the premise underlying the following developments.

The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor,[23] *the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.*

The aim, after all, of article 30 (with new wording to be determined) is to protect the debtor, and this aim should inform the drafting of this text if it is retained.

With regard to article 31,[24] the choice of the law governing the assignor, which might work well with regard to the substantive rules of the Convention, presents a real danger when the rule is isolated from its context. The debtor might be obliged to pay twice, once under the provisions of the law governing the assigned receivable and a second time under the law governing the assignor. There is no guarantee protecting the debtor from a real conflict between these two laws if the law is applied independently of the substantive rules of the Convention.

It is also noteworthy that, in its current wording, article 31 contains no provision concerning a conflict between subsequent assignees.

The group of experts noted that it is difficult to propose an "ideal" conflict-of-laws rule for this point. The application of the law governing the assigned receivable, which seems to be the most logical and sensible choice, presents a major difficulty in cases where the assignment relates to multiple receivables subject to different laws. The law governing the assignment contract, another possible choice, challenges the principle of the relative effect of conventions because it makes the rights of third parties dependent on the voluntary agreement of the parties to the assignment contract. Furthermore, the law of the assignor does not offer sufficient protection to the debtor, as already mentioned above.

As regards the mandatory rules and public policy, the question was raised as to their precise scope and the need to retain the reference to the issues dealt with in this chapter. The experts stressed that the scope of application of these provisions should not be extended beyond the issues covered in the chapter on conflict of laws.

Lastly, a point of purely procedural convention was raised during the discussion. If the Convention contains an "opt-in" clause, which is the way things seem to be moving, it will be necessary to stipulate that when a State takes up the option, the substantive provisions of the Convention prevail over the general conflict rules if the criterion for application of the substantive provisions is fulfilled.

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[23]The comment was made that the term "relationship between the assignee and the debtor" is too vague and that it would be preferable to enumerate the issues that could possibly arise between these two actors. The current wording of article 30 thus gives such an enumeration: the right of the assignee to request payment; the debtor's obligation to pay; the exceptions that might be raised by the debtor. While, *a priori*, the list might appear to be exhaustive, it is hardly a good legislative method to confine a rule, in advance, in a closed list which could prove in the long term to contain gaps.

[24]This text proposes conflict-of-laws rules for conflicts of priority, i.e. the invocability of the assignment with respect to third parties. It is an innovatory text since the Rome Convention makes no provision in this regard and the case-law of the Contracting States of this Convention varies as to the law applicable in such circumstances. Mention might be made here of a decision of the Netherlands Court of Cassation (*Hoge Raad*) of 16 May 1997 (case *Brandsma v. Hansa Chemie Aktiengeselischaft*), according to which the law of the assignment contract designated by article 12, paragraph 1, of the Rome Convention also applies to the effects of the assignment on third parties.